

## **FINAL STATEMENT OF REASONS:**

This action amends provisions governing the gang management of inmates within the California Department of Corrections and Rehabilitation (Department). California Code of Regulations, Sections 3040.1, 3341.5, 3375, 3375.3, and 3378 are being amended as a result of a settlement agreement, in the case of *Castillo v. Alameida, et al.*, Case No. C-94-2847-MJJ-JCS, U.S. District Court Northern District of California. This settlement agreement is a result of Inmate Castillo's challenge of the validation process for prison gang members/associates.

The Department certifies that gang activity undermines the safety and security of its institutions. The gang validation and debriefing process is necessary in order to decrease the risk that prison gangs pose to the safety and security of the institutions. The content of these regulations, pursuant to departmental policy, had been confined to the confidential and restricted portion of the Department's Operations Manual (DOM) Section 55000, and therefore, had been exempt from the Administrative Procedure Act (APA) [Penal Code section 5058 (c)(1)(B)(3) and Government Code Section 6254(f)]. Due to the ongoing need for an effective Gang Management policy and the urgent need to comply with ongoing departmental litigation, language regarding gang management is now being placed in the non-restricted DOM. This language is now subject to the APA, thereby requiring regulatory language to be placed in the Title 15. Changes to the regulations include language regarding Due Process, single source rule, hearsay, and staff training, all previously located in the confidential DOM.

This language provides the inmate and staff with clear and concise language regarding prison gang validation. This action includes language that states that a gang member or associate who is validated as a dropout of a prison gang may be removed from the general population or any other placement based upon a reliable source item identifying the inmate as an active gang member or associate of the prison gang with which the inmate was previously validated. This is necessary for the safety and security of inmates who have been validated as a dropout of a prison gang. Additionally, the verification methods now requires staff to articulate the basis for determining that the content of visual or audible observations or conduct at issue indicate gang activity; to articulate why, based on either the explicit or coded content of any material or documents, including addresses and names evidencing gang activity, that the written material is reliable evidence of association or membership with the gang; and to document information gathered in a written form.

In addition, changes for enhanced clarity, including reference, grammatical corrections, and changes in punctuation are also made to meet departmental standards.

## **DETERMINATION:**

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has determined that the facts, evidence, documents initially identified in the Initial Statement of Reasons support an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

## **ASSESSMENTS, MANDATES AND FISCAL IMPACT:**

This action will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states, because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

**Subsections 3040.1(a) through 3040.1(c)(2) are unchanged.**

**Subsection 3040.1(c)(3) is amended** to change the name Criminal Activities Coordinator to Institution Gang Investigator. This is necessary for consistency throughout the text and to better describe the duties of the individuals whose job description is to investigate gang affiliation and not to “coordinate criminal activities.”

**Subsection 3040.1(c)(4) through 3040.1(i) are unchanged.**

**Subsections 3341.5(a) through 3341.5(c)(5) are unchanged.**

**Subsection 3341.5(c)(6) is amended** to reflect language agreed upon in the Settlement Agreement regarding gang validation. This language provides the inmate and staff with clear and concise language regarding prison gang validation. The definition of “current activity” specifies that any documented activity within the past six years shall be utilized for the removal of the inmate from the general population, the review of the initial segregation order, and all periodic review of the indeterminate Security Housing Unit (SHU) term. Current activity is defined as, any documented activity within the past six (6) years. This language is consistent with existing language Section 3378(e) regarding gang activity. The term “inactive” means that the inmate has not been involved in gang activity for a minimum of six years. Inmates categorized as inactive who are suitable for SHU release are no longer categorized as being currently activity in gang activity. Additionally, this subsection is amended to include language that states that a gang member or associate who is validated as a dropout of a prison gang may be removed from the general population or any other placement based upon a reliable source item identifying the inmate as an active gang member or associate of the prison gang with which the inmate was previously validated. This is necessary for the safety and security of inmates who have been validated as a dropout of a prison gang.

**Subsection 3341.5(c)(7) through 3341.5(c)(10) is unchanged.**

**Subsections 3375(a) through 3375(g) are unchanged.**

**Subsection 3375(h) is amended** to include language that specifies an inmate shall be provided a copy of all non-confidential staff documentations placed in the inmate’s central file unless otherwise requested in writing by the inmate. This is necessary to ensure that inmates are properly notified and provided all relevant documents.

**Subsections 3375(i) through 3375(k) are unchanged.**

**Subsection 3375.3 initial paragraph through 3375.3(a)(4)(A) are unchanged.**

**Subsection 3375.3(a)(4)(B) is amended** to better describe the codes that are used as the method of verification of gang activity. The verification methods now requires staff to: 1) articulate the basis for determining that the content of visual or audible observations or conduct at issue indicate gang activity; 2) articulate why, based on either the explicit or coded content of any material or documents, including addresses, and names, evidencing gang activity, that the written material is reliable evidence of association or membership with the gang; and 3) document information gathered in a written form. Group or individual photographs with gang connotations shall

be dated prior to the photo being relied upon as a source item. The photo shall not be utilized if it is estimated to be older than six years. Any photograph utilized as a source item that depicts gang members shall require that at least one of the individuals in the photo be previously validated by the department or validated by the Department within six months of the photograph's established or estimated date of origin or validated by the CDC within six months of the photograph's established or estimated date of origin. This will ensure that validation of the gang member has merit and not just a photo taken with a random group of individuals.

In all instances, the information disclosed or documented on a form would not jeopardize the safety of any person or the security of the institution. The regulation is necessary because it requires the inclusion of as much information as possible without compromising safety and security.

**Subsection 3375.3(a)(5) through 3375.3(f) are unchanged.**

**Subsections 3378(a) through 3378(b) are unchanged.**

**Subsection 3378(c) is amended** to delete reference to the word coordinator. This is necessary for consistency throughout the text and to better describe the duties of the individuals whose job description is to investigate gang affiliation rather than coordinate criminal activities.

**Subsection 3378(c)(1) is amended** to ensure that documentation of the inmate/parolee's gang activity status is specific to a currently active, or inactive member/associate. This section is consistent with Section 3341.5(c)(5).

**Subsection 3378(c)(2) is amended** to delete the word coordinator from text. This is necessary for consistency throughout the text and to better describe the duties of the individuals whose job description is to investigate gang affiliation rather than coordinate criminal activities. Additionally, this subsection focuses on currently active gang member activity entered into the inmate's central file. Safety concerns of an inmate/parolee have never been facts that were entered into the central file with regards to gang validation. This regulation corrects that error in the language.

**Subsection 3378(c)(3) and (4) is amended** to ensure that at least one (1) of the three (3) required independent source items of documentation indicative of actual gang membership be a direct link to a current or former validated member or associate of the gang. This is necessary to ensure that information gathered to validate gang membership is specific and accurate and that inmates' associations are direct links and not just minor associations with other gang members.

**Subsection 3378(c)(5) is unchanged.**

**Subsection 3378(c)(6) is amended** to include the specific process by which verification of an inmate/parolee's gang identification shall be validated or rejected. This subsection is a direct result of the stipulated agreement and language has been written to comply with the agreement. This also affords the inmate/parolee all due process rights. The specific processes include step-by-step instructions regarding: (A) prior to submission of a validation package, the subject (inmate/parolee) shall be interviewed and given an opportunity to be heard in regard to the source items used in the validation or inactive review; (B) the inmate is provided with written notice at least 24 in advance of the interview, it also allows for the interview to be held earlier than 24 hours if the inmate waives that right in writing; (C) all source information referenced in the validation or inactive review process shall be disclosed to the inmate at the time of notification and the inmate shall receive copies of all non-confidential documents, unless the inmate requests in writing that he not receive copies of these documents. Also, confidential information will be disclosed via a departmental Confidential Information Disclosure Form; (D) the interview shall be documented and recorded on the appropriate form as stated in Section 3378(c)(2) and include a record of the inmate's opinion on each source item used for validation, and provide a written record to the inmate within fourteen calendar days prior to the submission of the validation package to the Law Enforcement Investigation Unit (LEIU); (E) the validation package or inactive review, including the documented interview shall be submitted to LEIU; (F) the inmate's mental health status and/or the need for staff assistance shall be evaluated

prior to the interview, and Section 3318 sets the guidelines for staff assistance assignments; and (G) lists the forms and procedure for validation and/or rejection of evidence documentation.

**Subsection 3378(c)(7) is unchanged.**

**Subsection 3378(c)(8) is amended** to comply with the stipulated agreement and make more specific the sources and criteria upon which gang identification is based. The new language defines existing criteria, such as self admission. The new language also expands on existing definitions and ensures specific, detailed documentation and disclosure of information verbally and in written form to the inmate/parolee and in the central file. Criteria such as tattoos and symbols, photographs, written material, must be described, dated, and staff must articulate why the material is being considered. Additionally, staff shall document and disclose information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

**Subsection 3378(d) through 3378(e) are unchanged.**

**Subsection 3378(f)(1) is renumbered to 3378(f)** to correct an incorrect numbering sequence. Additionally, it is amended to include language that states that a gang member or associate who is validated as a dropout of a prison gang may be removed from the general population or any other placement based upon a reliable source item identifying the inmate as an active gang member or associate of the prison gang with which the inmate was previously validated. This is necessary for the safety and security of inmates who have been validated as a dropout of a prison gang. Additionally, a non-substantive change is made to capitalize the word Section, to be consistent throughout the text.

**Subsections 3378(f)(2) and (f)(g) are renumbered to 3378(g) and (h), respectively.** Additionally, a non-substantive change in (h) is made to capitalize the word Section, to be consistent throughout the text.

#### **PUBLIC HEARING COMMENTS:**

**Public Hearing was held on November 30, 2005 at 9:00 a.m.**

#### **SPEAKER #1:**

**Comment A:** Speaker contends that as an attorney in the *Castillo* case, he wanted to comment on the proposed rules. He states that the purpose is not to condemn the uses of the security housing units, but the purpose is to decide whether the RPMB has successfully done their job to incorporate the provisions of the *Castillo* settlement into the Title 15. He states that the Department has been successful.

**Accommodation:** None.

**Response A:** Department agrees with Commenter's assertion that the Department has been successful in carrying out the settlement agreement of the *Castillo* case.

**Comment B:** Speaker contends that in Section 3023, the definition of gang activity is a point of contention between inmates and staff. He states that there is a specific intent standard when these rules are applied, that the inmate may be knowingly or unknowingly assisting and furthering gang activities. He reminds the Department officials who review gang validations to determine that the inmate knew the person they were corresponding with was in fact a known validated gang member at the time. He contends that there are activities that would be a violation of the Penal Code, but that everything before that is a question mark.

**Accommodation:** None.

**Response B:** Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is insufficiently related to the specific action or actions proposed. Section 3023 is not being amended, adopted or repealed by the regulatory action, and therefore does not require a response.

**Comment C:** Speaker contends that he disagrees with the Department's position that if the inmate was validated prior to *Castillo* that during the 180 day ICC or UCC review that there does not need to be a finding of current active status. He believes this defies the terms of the *Castillo* settlement and that anything that happens after the implementation of *Castillo*, which is November 2004, must comply with its terms.

**Accommodation:** None.

**Response C:** Department contends that the regulations do not amend, adopt, or repeal language specific to the 180 day ICC or UCC review. Additionally, the language in these regulations was specifically written and agreed upon by all parties in the *Castillo* settlement. The Department contends that these regulations do not defy the terms of the *Castillo* settlement agreement. **Also, See Speaker #1, Response 1.**

**Comment D:** Speaker contends that he has a little bit of history as to how the Department came up with the 6 year requirement. He states that there is no peneological study, nor any empirical evidence that six years is required for an inmate to drop out of a gang or remain inactive, in fact he states that it is contrary to the evidence. He states that in Connecticut, they wait about a year. He submits that the six year notice will be debated and will be ultimately subject to litigation because he contents that there is no meaningful bench mark. He states that there is no peneological relationship to promoting safety and security of the institutions.

**Accommodation:** None.

**Response D:** Department contends that the 6-year requirement is consistent with existing language in Section 3378(e). This length of time was further supported in the *Castillo* Settlement. The Department has a sincere desire to keep inmates from joining and participating in gang activity. The Department contends that 6 years is a reasonable timeframe for a person who has demonstrated a willingness to change their behavior to actually prove a permanent behavioral change. The Department disagrees with the Commenter and contends that there is no peneological study, nor any empirical evidence to contradict the 6-year requirement or to show that it is in fact an appropriate or inappropriate measure of an inmate's ability to change their behavior. The 6-year requirement provides a measure of safety and security in allowing an inmate who is not involved in gang activity to adapt to their new behavior and lifestyle as a "non-affiliate or non-gang member." The Department also contends that providing a safe and secure environment for staff as well as inmates is of the utmost importance. Any measures taken by the Department that provide such an environment must be strictly adhered to.

**Comment E:** Speaker contends that the Institution Gang Investigator (IGI) require training on an ongoing basis and that he hopes that more IGI's are being trained regarding *Castillo*. He states that the rules must be explained to the mainline prison population. He also states that Inmate Appeals need some checks and balances and that there has to be ongoing internal audits by the Department. He states that the Department complies with the letter of the law but not the spirit of the law. He contends that if the Department wants to be credible on these issues then they have to work on the issues. He states that if they don't, then they are allowing the validation process to become an unlawful means of retaliating or

taking inmates off of the mainline who have proven to be disruptive. However, the Speaker does state again that the regulations are appropriate as written, but implementation and enforcement may be thorny.

**Accommodation:** None.

**Response E:** Department contends that initial training is provided to each Institution Gang Investigator. Each IGI employee must attend ongoing training sessions in which they are provided the most up to date investigative procedures and information, including new laws, policies, and court rulings or agreements (*Castillo*) that affect or change their current job description. These regulations were posted at locations accessible to inmates, parolees, and employees in each Department facility and field office. These facilities made the notice of regulations available for review by inmates in segregated housing and distributed the notice of regulations to inmate law libraries and advisory councils. Inmates have access to institutional staff that are able to explain the regulations or answer questions that the inmates may have. Additionally, portions of this comment are insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to those portions of the comment.

**SPEAKER #2:**

**Comment A:** Speaker contends that she visits Corcoran Prison regularly and reads the mail from the SHU and has comments from inmates who have been in SHU for 8, 12 22, 23 32, 44 years. She states that there would be no way to justify the use of SHU as such. She states that there is no transparency in the SHU, consequently, the inmates are not able to know why they are being validated and staying in SHU. She states that inmates are being kept in SHU because their tattoos identify them as gang members. She states that this is not logical and that the changes in the regulations need to meet the needs of society, inmates and officers. She states that she has a letter from an inmate regarding the unfair treatment, and the incorrect or inappropriate validation as a gang member and the lack of due process. She stated that she agreed with the previous Speaker #1 regarding the six year time limit, and that SHU was for violent people and that the guards misuse the current system.

**Accommodation:** None.

**Response A:** Department contends that although portions of the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment. Additionally, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. The definition for Security Housing Unit (SHU) is in Section 3341.5(c). Inmates whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU. Also, pursuant to 3341.5(c)(4), an inmate who is a validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process; or as defined in Section 3378(e), an inmate housed in a SHU as a gang member or associate may be considered for review of inactive status by the Departmental Review Board when the inmate has not been identified as having been involved in gang activity for a minimum of six (6) years.

**Comment B:** Speaker contends that there should be training and a system in place for inmates who have been in SHU for 6 years that they can't be just thrown back out in the yard. She states that the disciplinary actions and gang affiliation actions should be investigated as guard instigated.

**Accommodation:** None.

**Response B:** Department contends that initial training is provided to each Institution Gang Investigator. Each IGI employee must attend ongoing training sessions in which they are provided the most up to date investigative procedures and information, including new laws, policies, and court rulings or agreements (*Castillo*) that affect or change their current job description. Additionally, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

**SPEAKER #3:**

**Comment A:** Speaker contends that the SHUs are devastating to mental and physical health and public safety. She states that she is happy about the gang validation regulations and that the process is being examined. She wants to see the *Castillo* settlement implemented consistently. She receives letters from inmates telling her of the incorrect validation and being stuck in SHU for decades not just six years. She wants to see proper enforcement through application and training and an internal audit system throughout the Department.

**Accommodation:** None.

**Response A:** Department contends that there will be a consistent statewide implementation of the regulations upon approval by the Office of Administrative Law. The regulations will become effective upon filing with the Secretary of State. Additionally, the Department contends that initial training is provided to each Institution Gang Investigator. Each IGI employee must attend ongoing training sessions in which they are provided the most up to date investigative procedures and information, including new laws, policies, and court rulings or agreements (*Castillo*) that affect or change their current job description. Lastly, internal audits are conducted on a statewide basis to ensure proper enforcement of and adherence to all policies and regulations within the Department.

**SPEAKER #4:**

**Comment A:** Speaker contends that she has had continuous correspondence with inmates in SHU and with those who expect to be there. She states that there is a loss of interest in gangs among inmates because of their fear of going into the yard and into the cells for gang members. She states there are too many and that there is almost no evidence against them. She states there are a number of inmates who are not given any reason why they cannot be released on the basis of inactive status after they have completed the six years.

**Accommodation:** None.

**Response A:** Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment. Additionally, the Department contends that any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

**Comment B:** Speaker contends that the Department should look into the future and have some aspect of the gang behavior before they are placed in SHU. They should have to prove their affiliation with some gang member.

**Accommodation:** None.

**Response B:** Department contends that information may be used as a source of validation if the informant provides specific knowledge of how he/she knew the inmate to be involved with the gang as a member or associate. Multiple confidential sources providing information regarding a single gang related incident or behavior shall constitute one source item. Exclusive reliance on hearsay information provided by informants will not be used for validation purposes. Staff shall articulate the basis for determining gang affiliation, and document and disclose this information to the inmate/parolee in a written form to prove gang affiliation.

**SPEAKER #5 (phone call into the office received after the public hearing):**

**Comment A:** Speaker contends that she is speaking on behalf of the inmates in SHU at Corcoran and on behalf of her son who is a SHU transfer. She states that the rule is unfair for two reasons. She states that the Department defines current activities as a documented activity within the past six years. She states that behavior from six years ago does not prove that an inmate is currently active in that kind of behavior. It is a conflict. She states that it is discriminatory. She asks what kind of activities place inmates in SHU – the law is not being violated. She states that inmates in the SHU at Corcoran State Prison want the Department to consider their voices.

**Accommodation:** None.

**Response A: See Speaker #1, Response D. Also,** Department contends that the definition for Security Housing Unit (SHU) is in Section 3341.5(c). Inmates whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU. In Section 3375.3(a)(4)(B) 1 – 10, inmates are advised of the Department's method of verification. Specific signs and symbols are not listed in the regulations due to the enormity of different gang-related activities and the ever changing and evolving types of signs, symbols, activities, etc. Also, inmates, pursuant to 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process. The Department contends that there is no conflict or discrimination. Any inmate may debrief or utilize the appeal process to appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. The Department contends that the California Code of Regulations has the force of law and any violation thereof justifies possible disciplinary action on the part of the Department.

**Comment B:** Speaker contends that inmates are subjected to recycled water with waste products in it and that the inmates are getting sick. She contends that thyroid cancer exists in the prison and that the SHUs are similar to torture and it is like committing genocide against people like the Rashja and the African people. She wants this statement to be put on the record.

**Accommodation:** None.

**Response B: See Speaker #4, Response A.**

**SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:**

**COMMENTS #1:**

**Comment A:** Commenter contends that gang validation must be based on more than a mere association with gang members. Commenter restates current and proposed regulations, in Sections 3378(c)(3) and (4),



also 3378(c)(8)(A)-(M) regarding a gang member who is an inmate/parolee who has been accepted for membership into a gang and prisoner's source documentation of gang associates/members. Commenter contends that gang validation based only on a prisoner's "association" with gang affiliates is an over inclusive and unreliable way to determine participation in gang activity and allows for arbitrary identification of gang affiliation. They also contend that Court decisions, *Toussaint v. McCarthy*, requires such decisions be supported by some evidence. Commenter contends that validation should not be based on "association" criteria alone, rather require three independent sources for validation, at least one of those sources must be based on criteria other than association factors. The Commenter provides examples regarding "associate" with gang affiliates in a prison setting, such as medical appointments or in line at the canteen. They contend that this is associating with gang members and that this social interaction could be considered a basis for validation based on "association" criteria alone.

**Accommodation:** None.

**Response A:** Department contends that gang validation is based upon more than a mere association with gang members. Gang validation requires elements stated in the regulations, such as three independent source items of documentation and at least one source item is required to be a direct link to a current or former validated member or associate of the gang. Sources are based upon the criteria stated in Section 3378(c)(8)(A)-(M). Gang association is not based upon inmates interaction while in line at a medical appointment or in line at the canteen, but is based upon evidence collected from criteria listed in these regulations. In *Toussaint vs. McCarthy* the court found that any decision to place prisoners in segregated confinement must be supported by some evidence. The Department contends that these regulations support *Toussaint vs. McCarthy* in Section 3378(c)(3) and (4) regarding documented evidence.

**Comment B:** Commenter contends that the number of years required for a validated gang member in the SHU to achieve "inactive" status should be reduced. Commenter contends that inmates may actually be "inactive" but do not want to complete the formal debriefing process due to not wanting to incriminate themselves by disclosing information about gang activity or that their safety may be in jeopardy.

**Accommodation:** None.

**Response B: See Speaker #1, Response D.** Also, pursuant to Section 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process. Also, safety and security of all staff and inmates are a priority for the Department; therefore, if inmates who have debriefed are threatened or if their safety is in jeopardy, they should report the threat immediately to institution staff. Furthermore, those inmates whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU.

**Comment C:** Commenter contends that allowing validated gang members who are verified as inactive to be transferred from the SHU to General Population (GP) would encourage inmates to stop their gang activity. Commenter states that requiring the inmate to have been inactive for a six-year period is an unreasonably long period of time and negates any incentive to become inactive. However, commenter does agree that it is reasonable for the prison to require an inmate to be inactive for a period of time in order to protect the security interests of the prison.

**Accommodation:** None.

**Response C: See Speaker #1, Response D.** Also, inmates, pursuant to 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process.

**Comment D:** Commenter contends that Section 3341.5(c)(5) requires that “inactive” prisoners first be transferred to a Level 4 facility for an observation period before being transferred to a facility consistent with their safety and security.

**Accommodation:** None.

**Response D:** Department contends that Section 3341.5(c)(5) is not amended, adopted or repealed in these regulations. Only regulatory text that is indicated by underline or strikethrough will be considered.

**Comment E:** Commenter states that Section 3378(f) provides that an inactive gang member may be returned from General Population to the SHU based upon on reliable source item, ensuring that prior gang members are closely monitored for a period of time after being released to the GP, resulting in SHU inmates remaining in the SHU for a period of six years before they can be placed in the GP. They contend that this is unreasonable and should be reduced.

**Accommodation:** None.

**Response E:** See Speaker #1, Response D.

**COMMENTS #2:**

**Comment A:** Commenter contends that there are many positive changes in these regulations, specifically the gang affiliation evidence being used to establish gang involvement and the interview process and the due process for referral to SHU.

**Accommodation:** None.

**Response A:** Department agrees with commenter.

**Comment B:** Commenter contends that the regulations are broad and vague. Subsection 3341.5(c) clearly states that inmates are placed in the SHU because their conduct endangers the safety of others or the safety of the institution; however, commenter contends that little is said about actual conduct in the subsequent sections. They contend that the words “activity” and “actively” are unclear and that acts committed six years previously are different than current acts. They contend that gang activity should be specific unlawful acts committed on behalf of a gang. The commenter cites *Rios v. Lane*, 812F. 2d 1038 (7<sup>th</sup> Cir. 1987) as the Court calling for a clearly drawn definition.

**Accommodation:** None.

**Response B:** Department contends that the regulations are not overbroad and are not vague. They are in fact, very specific regarding inmates’ actual conduct specific to gang membership, gang activity and gang behavior. In Section 3375.3(a)(4)(B) 1 – 10, inmates are advised of the Department’s method of verification. Specific signs and symbols are not listed in the regulations due to the enormity of different gang-related activities and the ever changing and evolving types of signs, symbols, activities, etc. Department contends that the dictionary’s definition of the word current could be interpreted in various ways. Current could mean occurring in or existing at the present time, most recent, or it could mean generally accepted. It is generally accepted and was not opposed in the *Castillo* Settlement that “current activity” is defined as, any documented activity within the past six (6) years.

The *Rios v. Lane* is a 7<sup>th</sup> Circuit case and is not binding upon the Department. Regardless, in *Rios v. Lane*, prison officials transferred a prisoner to a maximum security prison after they found that he violated a rule that prohibited gang activities. The prisoner filed an action against the prison officials. Prison officials were granted a motion for summary judgment – the prisoner appealed and asserted that his punishment violated his First Amendment right of free speech and the rule violated his Fourth Amendment right to due process because it was overbroad and vague. The Court held that the prisoner's free speech rights were properly restrained by enforcement of the rule to eliminate prison gangs and promote security and discipline, but that the notice to the prisoner that his conduct was prohibited fell short of that notice required under the Fourth Amendment. The order granting summary judgment to the prison officials was reversed and the case was remanded. The Department contends that the regulations, do not violate Fourth Amendment rights to due process. Inmates were provided notice of these regulations via the posting of the Notice of Change to Regulations, (NCR 05/08).

**Comment C:** Commenter contends that in subsection 3375.3(a)(4)(G) lumps “association” in with all other gang affiliations so that no distinction is made between actual gang members and associates. Commenter contends that there is no way in a prison setting that inmates would not be able to “associate” with members of gangs or be in close proximity to them. Commenter contends that subsection 3378(c)(4) only requires one direct source to validate an associate member. She contends that guilt by association is a violation of the constitution and should not appear in these regulations.

**Accommodation:** None.

**Response C:** Department contends that subsection 3378(c)(4) actually states that validation of an inmate/parolee as a member of a prison gang shall require that at least one (1) source item be a direct link to a current or former validated member or associate of the gang. This regulation is to ensure that at least one of the three required independent source items of documentation indicative of actual gang membership being a direct link to a current or former validated member or associate of the gang. Information gathered to validate gang membership is specific and accurate and inmates' associations are direct links and not just minor associates with other gang members by, for example, being on the same yard or near each other in line at the canteen.

### **COMMENTERS #3 - 10:**

**Comment A:** Commenters contends that the six-year inactive requirement is arbitrary and unfair. They contend that an inmate has to be in SHU for 6 consecutive years before even being considered by release.

**Accommodation:** None.

**Response A:** See Speaker #1, Response D.

**Comment B:** Commenters contends that the definition of a “current active” gang affiliate and “current gang activity” as any documented gang activity within the past 6 years is fundamentally unfair. They contend that is conflicts with court decisions and is not in accordance with the dictionary's definition of the word “current.” They request that the department define “current active/gang activity” as any documented gang activity within the past 12 months, and that prisoners be afforded procedural due process per CCR 3312-3320 for alleged violations of CCR 3023.

**Accommodation:** None.

**Response B:** See Speaker #1, Response D. Also, Department contends that the dictionary's definition of the word current could be interpreted in various ways. Current could mean occurring in or existing at the

present time, most recent, or it could mean generally accepted. It is generally accepted and was not opposed in the Castillo Settlement that “current activity” is defined as, any documented activity within the past six (6) years.

**Comment C:** Commenters contends that in the event a prisoner is accused of gang activity, (CCR Section 3023), to justify the “current active” gang label, then those procedural safeguards governing rule violations per Sections 3312-3326 must be adhered to. They contend that to accuse the inmate of violating Section 3023 five or six years ago without notice of charges, hearing, nor disposition erodes the constitutional guarantee to the presumption of innocence and the due process and equal protection clause.

**Accommodation:** None.

**Response C:** Department contends procedural guidelines are adhered to and safeguards are in place to ensure compliance to departmental regulations. Pursuant to *Toussaint vs. McCarthy*, “Due process clause does not require detailed written notice to prisoner of charges resulting in administrative segregation, does not require representation by counsel or counsel substitute, does not require opportunity to present witnesses, and does not require written decision describing reasons for placing prisoner in administrative segregation; due process also does not require disclosure of identity of person providing information leading to placement of prisoner in administrative segregation.” *Toussaint vs. McCarthy* also found that due process required only that prison officials hold informal non-adversary hearings within a reasonable time after a prisoner is placed in segregation and inform him of charges against him and give him an opportunity to present his views. It also found that any decision to place prisoners in segregated confinement must be supported by some evidence. The Department contends that these regulations support *Toussaint vs. McCarthy* in Section 3338 regarding a classification hearing, and in Section 3378(c)(3) and (4) regarding documented evidence.

Additionally, pursuant to Section 3084.1, an inmate may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. Also, pursuant to 3341.5(c)(4), an inmate who is a validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process.

#### **COMMENTS #11:**

**Comment A:** Commenter contends that activity that is 5 or 6 years old does not demonstrate that a prisoner is “currently active.” Commenter contends that Webster’s dictionary defines “current” as “belonging to the time actually passing present: the current month.” The word “present” is defined as “existing or occurring now.” Commenter states that if a person was a drug addict 5 or 6 years ago, but today in the present time lives his life as a drug counselor, would it be fair to use the past, out dated information to say he’s currently active in such behavior? Commenter contends not, and states the Department’s definition of current active/gang activity is arbitrary, an abuse of discretion, illogical and violates due process.

**Accommodation:** None.

**Response A:** See **Speaker #1, Response D and Commenters #3-10, Response C.** Also, the Department contends that the dictionary also defines the word “present” as “constituting the one actually involved, at hand, or being considered, or relating to.” The Department contends that a person who was a drug addict 5 or 6 years ago and is now a drug counselor has obviously stopped that destructive behavior and has since turned around in the opposite direction. Those who have been verified as a currently active member or associate of a gang have a choice to turn around from that behavior and go the opposite direction.

Pursuant to Section 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process.

**Comment B:** Commenter contends that in *Toussaint v. Rowland*, the Court held that prior to receiving an indeterminate SHU term, IGI must designate the prisoner as being a “current active” gang member. Commenter states that this evaluation must occur every 120 days and if the inmate is retained in segregation beyond 12 months, there must be evidence of present and active allegiance to a gang. Commenter requests that the Department define “current active/gang activity” in a just and fair manner and in accordance with the actual definition, ensuring due process.

**Accommodation:** None.

**Response B: See Speaker #1, Response D.** Department contends that language regarding “current active” gang member is not part of the *Toussaint* case. The language referenced in the comments is directly from the *Castillo* case. The *Toussaint* case does however state: “Injunction requiring that prisoner not be placed or retained in segregation unless allowing prisoner to remain in general population would severely endanger lives of prisoners, security of institution, or integrity of investigation into criminal activity was not an abuse of discretion as they merely restated the reasons justifying administrative segregation and did not impinge upon prison authority's ability to hold disciplinary hearings.” In the *Castillo* case, the settlement language states: “Each ICC and/or UCC review of an indeterminate SHU term will review the inmate’s current gang status and indicate that status of a 128G chrono... ‘Currently active’ gang status is defined as any documented gang activity within the past six years consistent with CCR 3341.5(c)(5).” In the case of *Madrid v. Gomez*, (N.D. Cal. 1995) 889 F.Supp. 1146, 1278, the Court recognized that an inmate could be deemed a gang member even though that inmate may not have affirmatively engaged in gang activity for some period of time after being placed in the SHU. The Court concluded that “defendants do not violate due process by failing to give persuasive value to the fact that an inmate’s record reflects an absence of gang-related activity or association over some period of time.” Consequently, defining “currently active” as any documented activity within the past six years satisfies due process.

**Comment C:** Commenter contends that “gang activity” is unconstitutionally vague, invites discriminatory enforcement and oppression, does not provide fair notice of the conduct that it actually prohibits and violates due process. Commenter requests that Section 3023 be amended to specify the prohibited conduct. Commenter states that in *Rios v. Lane* that the Court held that “Gang Activity” was vague and states that “where prohibited, conduct does not carry with it its own indicia of wrong doing the need for clearly drawn prison regulations is particularly acute.”

**Accommodation:** None.

**Response C: See Commenter #2, Response B.** The Department contends that the regulations are much more specific in their description of prohibited conduct than the regulations at issue in the *Rios* case. Section 3378 is very specific about the types of activity that can be used to validate an inmate as a gang member/associate. In addition, Section 3378 requires that staff articulate why the activity is gang-related. This is sufficient to satisfy due process.

**Comment D:** Commenter opposes the Departments failure to provide due process for gang activity. Commenter contends that it is unfair to define current gang activity as something 6 years old and even worse to erode their presumption of innocence to label any of the inmates as “currently active” based on past gang activity without ever providing those procedural due process safeguards per Sections 3312-3326.

**Accommodation:** None.

**Response D: See Speaker #1, Response D and Commenter #11, Response C.**

**Comment E:** Commenter urges that IGI and LEIU staff receive training on the handling of misconduct and that no inmate be designated as “currently active” in the absence of a completed Rules Violation Report and the disposition of “guilty” for violating Section 3023. Commenter requests procedural safeguards.

**Accommodation:** None.

**Response E:** Department contends that initial training is provided to each Institution Gang Investigator. Each IGI employee must attend ongoing training sessions in which they are provided the most up to date investigative procedures and information, including new laws, policies, and court rulings or agreements (*Castillo*) that affect or change their current job description. The Department contends that in Section 3375, it states that the classification process shall be uniformly applied, commencing upon reception of a person committed to custody... Each inmate shall be individually classified in accordance with Article 10, Classification. Also, inmates, pursuant to 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process. The Department contends that procedural guidelines are adhered to and safeguards are in place to ensure compliance to departmental regulations.

**Comment F:** Commenter opposes Section 3341.5(c)(6) as vague. Also, the practice of the Departmental Review Board in releasing and retaining prisoners in SHU because the “current active determination reflected in paragraph 24 of the settlement agreement in *Castillo v. Alameida* is clear. It states that a validated inmate will not receive an indeterminate SHU term without first being found to be a current active gang member or associate. Commenter contends that the Initial Statement of Reasons appear to acknowledge this requirement, they contend that an actual reading of Section 3341.5(c)(6) reveals that the regulation lends itself to abuse, and raises the assumption that the current active determination applies only to inactive prisoners and/or dropouts in the General Population rather than to all prisoners facing indeterminate SHU terms as mandated by paragraph 24 of the settlement. Commenter requests clarification of Section 3341.5(c)(6) to protect due process rights and prevent discriminatory enforcement.

**Accommodation:** None.

**Response F:** Department contends that Section 3341.5(c)(6) is specific and clear and is consistent with language in the *Castillo* Settlement Agreement. The Initial Statement of Reasons (ISOR), as required by Government Code 11346.2(b) includes the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that is reasonably necessary to carry out the purpose for which is it proposed. The ISOR meets that requirement by explaining and acknowledging this requirement. **Also, See Commenter #11, Responses B and C.**

**Comment G:** Commenter contends that the Departmental Review Board (DRB) takes the role of the ICC and is arbitrary and collides with the *Toussaint* Court injunction. Commenter contends that to make an inmate anguish in the oppressive condition of the SHU for 6 consecutive years prior to being considered for release by the DRB undermines the functions of all ICC/UCC reviews the entire time of detention and, makes all reviews useless. Commenter contends that the DRB undermines due process and requires an inmate to serve 6 years in the SHU before receiving a fair hearing to be considered for release. Commenter requests that release occur immediately for inactive prisoners, rather than one to two years after being designated as inactive which is the current process.

**Accommodation:** None.

**Response G: See Commenter #11, Responses B and C.**

## **COMMENTER #12:**

**Comment A:** Commenter contends that she spends countless hours being educated regarding the problems of crime and incarceration. She contends that the American Bar Association has said that the main purpose of incarceration is rehabilitation, but that little is done beyond what the inmate does himself. She states that she heard a story regarding two youthful gang members who were murdered as a result of being forced to testify against other gang members without protection.

**Accommodation:** None.

**Response A:** Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is either insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

**Comment B:** Commenter contends that Penal Code Section 5058 states that “this language provides the inmate and staff with clear and concise language...” She contends that the proposed regulations are vague and encourage over-zealous prison staff to confine any inmate who makes any attempt to befriend any gang member to segregation for endless period, for example, a “jailhouse lawyer” assisting a gang member may find themselves in SHU tagged as an “associate gang member.”

**Accommodation:** None.

**Response B: See Commenter #1, Response A. Also,** Department contends that the proposed language is not vague, but is clear and concise as required by PC 5058. Section 3378 is very specific about the types of activity that can be used to validate an inmate as a gang member/associate. In addition, Section 3378 clearly and concisely requires that staff articulate why the activity is gang-related.

**Comment C:** Commenter contends that providing a clear guideline or a definition for the following terms would be helpful: gang activity, reliable source, security of institution, disruptive group.

**Accommodation:** None.

**Response C:** The *Castillo* Agreement specifies in the definition section that “gang activity” is defined in the agreement consistent with the definition in Title 15, Section 3000 and 3023. Furthermore, “Reliable source” is a dependable, consistent, or trustworthy informant, resource or supplier of information. “Security of institution” is defined in Section 3270. “Disruptive group” is defined by the dictionary as a group that is unruly, disorderly, troublesome or upsetting.

**Comment D:** Commenter contends that a period of six years is too long to require an inmate record to be clear of gang activity. She contends that one of the greatest crimes is that of denying inmates assistance in distancing himself from his undesirable behaviors. She contends that inmates need assistance in distancing themselves from gang behaviors. A private citizen has established a program to aid gang members remove their tattoos and turn their life around.

**Accommodation:** None.

**Response D: See Speaker #1, Response D.**

**Comment E:** Commenter contends that prison staff lock down inmates when only a few are to blame, but file charges against a few staff members out of scores who are violating state and federal laws and the constitution and the United Nation's minimum standards for prisons, which sends the wrong signal to inmates. She contends that the Department needs to go beyond this amendment to do more.

**Accommodation:** None.

**Response E: See Speaker #1, Response A. Also,** Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is insufficiently related to the specific action or actions proposed.

**COMMENTS #13:**

**Comment A:** Commenter contends that there is no criteria for designating what constitutes a "street gang" or "disruptive group" i.e. "Outlaw Motorcycle Club." He contends this term is 50 years old and is meant for any motorcycle club not charted by the American Motorcycle Association. He contends that once a club has been tagged an "outlaw club" there is no way to be taken off this list, even if has been 30-50 years since they evolved into a regular law riding club.

**Accommodation:** None.

**Response A:** Department contends that the definition of "gang" can be found in Section 3000. Additionally, portions of this comment are insufficiently related to the specific action or actions proposed, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to those portions of the comment.

**Comment B:** Commenter contends that motorcycle clubs have had no impact of the Department for more than 20 years, if ever, and may have 2 or 3 members in prison.

**Accommodation:** None.

**Response B:** Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, the above comment is insufficiently related to the specific action or actions proposed.

**Comment C:** Commenter contends that the regulations punish lawful relationships and punishes lawful freedoms of the First Amendment. He contends that there needs to be more due process to challenge the designation of street gangs. He contends that some connection to "disruptive" or "criminal" behavior to satisfy the U.S. and California Constitutions is necessary.

**Accommodation:** None.

**Response C: See Commenter #2, Response B.**

**COMMENTS #14:**

**Comment A:** Commenter contends that he was unfairly approved for validation as an "associate to other associates" based on 7 items submitted to LEIU. He states there are several flaws that still exist in the validation process and should be corrected. He states that Section 3378(c)(6)(A)-(E) will now require an interview to be held within 24 hours written notice, where the inmates under investigation will be



afforded opportunity to refute sources. He contends that in his case he requested the “validation package” the document stated that he had already been offered an opportunity to present a rebuttal and declined it – he contends that this is not true. Commenter continues to provide detailed information regarding how he was treated and how he only refused to exit his cell and did not waive his right to an interview, and he states an Inmate Appeal would be futile.

**Accommodation:** None.

**Response A:** Department contends that portions of the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 113435.9, portions of the comment are insufficiently related to the specific action or actions proposed. Also, Department agrees with the Commenter that Section 3378(c)(6)(A)-(E) will now require an interview to be held within 24 hours written notice, where the inmates under investigation will be afforded opportunity to refute sources.

**Comment B:** Commenter contends that Section 3378(c)(4) – classifying an “associate” as “current or former member or associate of the gang” is bound to be exploited. He contends that this will be abused by many vindictive gang investigators to arbitrarily construe all inmate associates in their investigations, even if they are already deemed inactive. He also states that since inmates are not allowed to know the gang status of other inmates and a new inmate begins communicating with another inmate, they may not know their status and then be unjustly labeled. He further states that this could be used as a tool or as a scare tactic. He further states that his address book of past acquaintances has been used in his validation package. He states that the investigators do not sufficiently disclose information that they’re supposed to.

**Accommodation:** None.

**Response B:** Department contends that the language in Section 3378(c)(4) is very specific so as not to be misinterpreted, exploited or misused by staff. Any inmate may debrief or utilize the appeal process to appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. Inmates, pursuant to 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process. Additionally, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

**Comment C:** Commenter requests that the words “or former” be deleted from the text of the regulation to prevent subjective interpretations of the statute from being misrepresented. He contends that by doing so, only “currently-active validated members or associated inmates will count and it will be a fair identification. He states that “former” associates, is too ambiguous and could broadly entrap half of a Level IV population. He contends that this regulation is vague and sends the message that inmates are not encouraged to have any friendships with any inmates for the duration of a prison term.

**Accommodation:** None.

**Response C:** Department contends that the entire text of the regulations, including the words “or former” specific to this comment, were amended as a result of a settlement agreement, in the case of *Castillo v. Alameida, et al.*, Case No. C-94-2847-MJJ-JCS, U.S. District Court Northern District of California. This settlement agreement is a result of Inmate Castillo’s challenge of the validation process for prison gang members/associates. The Department also contends that this language is specific as to the gang validation process.

**Comment D:** Commenter contends that there are no protections/requirements for the investigators to notify LEIU of contradictory information that directly undermines the credibility of a validation package after its submission. He contends that one of his source items as a “symbol” that was indicative of gang activity claimed to be found in his property. He contends that it was not his, and that his cellmate accepted responsibility for it and signed a declaration under penalty of perjury. Commenter contends that this information was withheld from LEIU along with a confidential memorandum prepared after submission of the validation package. He asks how he can be an associate to the same people as the Department lists as his enemy.

**Accommodation:** None.

**Response D:** Department contends that a declaration was not attached to this comment as stated above. Furthermore, the Department in Section 3378(c)(6)(A) that prior to submission of a validation package to the LEIU, or during the inactive review process, the inmate is given an opportunity to be heard in regard to the source items used in the validation or inactive review. The Department, at this time, would take into consideration any information the inmate possesses to prove their non-affiliation with gangs. Lastly, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

**Comment E:** Commenter contends that this regulation is deficient to redress validations or sources based upon the investigator’s deception, inmate gossip, and extensive gang investigations that subject inmates to segregation for up to a year before the validation package is served. He states that there needs to be a time limitation for the investigators to submit a validation package and for LEIU to base a decision. He contends that LEIU took 8 months to approve his validation for which there is no language in the CCR that he may appeal.

**Accommodation:** None.

**Response E:** Department contends that pursuant to Section 3378(c) there must be three independent source items of documentation indicative of actual gang membership. Mere gossip, staff deception or error, etc. would not fit the three-independent source item criteria. Inmates, pursuant to 3341.5(c)(4), validated prison gang member or associate shall be considered for release from a SHU, after the inmate is verified as a gang dropout through a debriefing process. Additionally, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

#### **COMMENTS #15:**

**Comment A:** Commenter contends that six-year inactive requirement is arbitrary and unfair. She contends that an inmate has to be in SHU for 6 consecutive years before even being considered by release.

**Accommodation:** None.

**Response A:** See Speaker #1, Response D.

**Comment B:** Commenter contends that the definition of a “current active” gang affiliate and “current gang activity” as any documented gang activity within the past 6 years is fundamentally unfair. She contends that it conflicts with court decisions and is not in accordance with the dictionary’s definition of the word “current.” She request that the department define “current active/gang activity” as any documented gang activity within the past 12 months and that prisoners be afforded procedural due process per CCR Sections 3312-3320 for alleged violations of CCR Section 3023.

**Accommodation:** None.

**Response B:** Department contends that the dictionary's definition of the word current could be interpreted in various ways. Current could mean occurring in or existing at the present time, most recent, or it could mean generally accepted. It is generally accepted and was not opposed in the Castillo Settlement that "current activity" is defined as, any documented activity within the past six (6) years. Any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. **Also, see Speaker #1, Response D.**

**Comment C:** Commenter contends that in the event a prisoner is accused of gang activity, (CCR Section 3023), to justify the "current active" gang label, then those procedural safeguards governing rule violations per Sections 3312-3326 must be adhered to. She contends that to accuse the inmate of violating Section 3023 five or six years ago without notice of charges, hearing nor disposition erodes the constitutional guarantee to the presumption of innocence and the due process and equal protection clause.

**Accommodation:** None.

**Response C:** Department contends that the procedural safeguards in Sections 3312-3326 are followed and strictly adhered to. It is generally accepted and was not opposed in the Castillo Settlement that "current activity" is defined as, any documented activity within the past six (6) years. Any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

**COMMENTS #16:**

**Comment A:** Commenter requests that the language that defines current activity as "any documented activity within the past six years" be even more specific and be changed to read "any misconduct committed on behalf of a gang" and the terms should be changed from six years to 12 months.

**Accommodation:** None.

**Response A:** See Speaker #1, Response D.

**COMMENTS #17:**

**Comment A:** Commenter contends that the 6 year inactive requirement is arbitrary and unfair. Commenter states that inmates are housed in SHU for 6 consecutive years before even being considered for release.

**Accommodation:** None.

**Response A:** See Speaker #1, Response D.

**Comment B:** Commenter contends that the definition of a "current active" gang affiliate and "current gang activity" as any documented gang activity with the past 6 years is fundamentally unfair. Commenter contends that it conflicts with the court decision and is not in accordance with the dictionary's definition of currently active. Commenter requests that the language that defines current activity as "any documented activity within the past six years" be even more specific and be changed to read "any misconduct committed on behalf of a gang" and the terms should be changed from six years to 12 months.

**Accommodation:** None.

**Response B: See Speaker # 1, Response D. and Commenters #3-10, Response B.**

**Comment C:** Commenter contends that procedural safe guards governing rule violations per Section 3312 must be adhered to. Commenter contends that to accuse the inmate of violating Section 3025, 5 or 6 years ago without notice of charge, hearing or disposition erodes the constitutional guarantee to the presumption of innocence and due process and equal protection clause.

**Accommodation:** None.

**Response C: See Commenters #3-10, Response C.**

**COMMENTER #18:**

**Comment A:** Commenter contends that the regulations are vague and overbroad. Commenter states that subsection 3378(c)(8)(B) will have an adverse effect upon an inmate's welfare. He strongly urges that all inmates be advised as to what signs/symbols are recognized by prison gang investigatory and LEIU to be indicative of active involvement in prison gang activities. He contends that currently, inmates are not notified.

**Accommodation:** None.

**Response A:** Department contends that the regulations are not overbroad and are not vague. They are in fact, very specific, and reflect language agreed upon in the Settlement Agreement regarding gang validation. Also, any inmate, pursuant to Section 3084.1, may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. In Section 3375.3(a)(4)(B) 1 – 10, inmates are advised of the Department's method of verification. Specific signs and symbols are not listed in the regulations due to the enormity of different gang-related activities and the ever changing and evolving types of signs, symbols, activities, etc. Additionally, 3378(c)(6)(C) states that inmates are notified of all source items referenced in the validation or inactive review process.

**Comment B:** Commenter contends that photo copy drawings older than 6 years are being use in the validation process resulting in indeterminate SHU terms. He contends that the mere possession of drawings, by inmates, which bare alleged gang signs/symbols, should not be the basis to remove a prisoner from the general population under the guise that an inmate poses an "immediate threat" to the safety of others or institutional security.

**Accommodation:** None.

**Response B: See Commenter #1, Response A.**

**COMMENTER #19:**

**Comment A:** Commenter contends that not every person who comes into prison is a member or an associate of any gang. He contends that Section 3375.3 of the Title 15, classification Score Sheet does not include a "non-affiliate" box. He states that people are being labeled when they come into prison based on the demographic locale of the residency at the time of their arrest.

**Accommodation:** None.

**Response A:** Department contends that if there is information that the inmate is or has been involved in gang activity, 6 points are entered in Box 35 of the Classification Score Sheet. If there is no evidence of gang affiliation then Box 35 will be left blank and the point will not be assessed. Therefore, by default, the Classification Score Sheet has a “non-affiliate” box. **Also, see Commenter #1, Response A.**

**Comment B:** Commenter contends that the classification proposal is marred in the fact that it will automatically place six points on a person’s classification score just because he resides in northern California. He contends that inmates in the sensitive needs yards disagree with the gang mentality and politics and only want to learn from their mistakes and return to society as productive citizens.

**Accommodation:** None.

**Response B: See Commenter #10, Response A.** The Department has a sincere desire to keep inmates from joining and participating in gang activity and to learn from their mistakes and return to society as productive citizens.

**Comment C:** Commenter contends that by the Department failing to offer individuals the “non-affiliate” title, which is used with the African Race, it places individuals into an environment that is dangerous and life-threatening. He states that once gangs see that a person does not wish to participate, they are targeted for assaults and placed on a blacklist. He states that it is the Departments responsibility to protect the inmate population and that this classification process does not meet the criteria. He states these regulations will only increase the gang population. He states that those that do participate are because of fear that they will be victimized. He requests that these comments be considered before there are more lawsuits.

**Accommodation:** None.

**Response C: See Commenter #19, Response A.** Department contends that providing a safe and secure environment for staff as well as inmates is of the utmost importance, and that gang activity undermines the safety and security of its institutions. The gang validation and debriefing process is necessary in order to decrease the risk that prison gangs pose to the safety and security of the institutions. Any measures taken by the Department, including the adoption of these regulations that provide such an environment are strictly adhered to.

#### **COMMENTER #20:**

**Comment A:** Commenter contends that since the inactive quota is 6 years, then all source information that can be estimated or dated over 6 years old should not be used in the validation process.

**Accommodation:** None.

**Response A: See Speaker #1, Response D.**

**Comment B:** Commenter contends that staff should be required to do more than just articulate their theory of why such things as conversations and cards are evidence of gang association. He states that it is easy to find a staff member who can articulate a “theory” by taking things out of context, which is common practice. He contends that all source information to be used should have to be an actual link to a gang promotion of violence, not just theorized by staff.

**Accommodation:** None.

**Response B: See Commenter #1, Response A.**

**COMMENTER #21:**

**Comment A:** Commenter asks, how would an inmate know of erroneous information if not given in conjunction with the Department's policy about 15 days after incident to submit CDC 602s.

**Accommodation:** None.

**Response A:** Department contends that 3375(h) does not have any specific timeframe. If the inmate wishes to appeal any erroneous information via the 602 process, it is in the inmate's best interest to obtain the all copies of the documentation placed in the Central File at the conclusion of the Classification Committee proceedings. Additionally, after waiving the option to obtain the copies, if the inmate becomes aware that there may be erroneous information in the Central file he may request copies of the documentation or request a review of his Central file via the Olson Review Process.

**Comment B:** Commenter contends that there is not form/format specified for "unless" waiver in section 3375(h) "unless otherwise requested in writing by the inmate."

**Accommodation:** None.

**Response B:** Department contends that there is no specific form or format needed to accomplish the provision in 3375(h), any written form may be submitted, i.e. letter, note, etc.

**Comment C:** Commenter contends that the Department should adopt information related to CCR 3375(h) so that the Department must provide documents within 10 days of creating them so they can be appealed timely. He contends that there are no known timelines in the CCR or DOM about when CDC128-G's/CDC 839/CDC840 have to be given to the incarcerated individual.

**Accommodation:** None.

**Response C:** See Commenter #21, Response A.

## **ADDENDUM TO FINAL STATEMENT OF REASONS**

**There are no changes to the Updated Informative Digest. The information contained in the Initial Statement of Reasons did not change, and no new data or any technical, theoretical or empirical study, report or similar documents were relied upon that were not identified in the initial statement of reasons.**

**The Stipulated Agreement -- Castillo v. Alameida, [*Castillo v. Terhune, et al.* (N.D. Cal., No. C94-2847 MJJ (BZ))] and CDC Forms 1030, 812-A, 812-B, 128-G, and 128 B-2 were documents that were relied upon and were available to the public upon request.**

The Notice of Change to Regulations 05/08 was the official notice of the Department and released to the public as a 45 day notice pursuant to the APA.

Non-substantial changes to the proposed text have been made for clarity purposes. Due to the Department of Corrections and Rehabilitation's ongoing reorganization, subsections 3378(c)(6), 3378(d) through 3378(e), and 3378(g) require amending. The position of assistant director, Law Enforcement and Investigations Unit (LEIU) has been permanently changed to Chief, Office of Correctional Safety (OCS). The position has not changed in duty or in placement; it is merely a name change due to the reorganization. Additionally, the LEIU has changed its name to OCS. The function of the unit/office remains the same, and the duties within the office remain unchanged.

Throughout the text of the proposed regulations the words "gang activity" and "gang affiliation" are used. The usage of these words is specific to the sections in which they are located and have been approved by the Department, the opposing Counsel and have been agreed upon in the Stipulated Agreement. Any change of wording would require the approval of the Court. Gang activity is any evidence of activity, and gang affiliation is any connection, relationship, association, etc. with gangs.

Throughout the text of the proposed regulations the words "verification" and "validation" are used. Validation is used as a step-by-step process that determines gang status, where verification is used to check or confirm the inmate's gang status.